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No. 97-570

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioner,
v.
UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS DUCHESNE COUNTY AND UINTAH COUNTY, UTAH

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SUPPLEMENTAL BRIEF OF PETITIONERS DUCHESNE COUNTY AND UINTAH COUNTY, UTAH

This Supplemental Brief of Petitioners, Duchesne County and Uintah County, Utah, is submitted in light of the recent decision of this Court in *South Dakota v. Yankton Sioux Tribe,* 66 U.S.L.W. 4092 (U.S. Jan. 26, 1998) (No. 96-1581), pursuant to Sup. Ct. R. 15.8.

ARGUMENT

I. THE DECISION OF THIS COURT IN *YANKTON SIOUX TRIBE* CONFIRMS THAT *UTE INDIAN TRIBE* MISCONSTRUED *HAGEN.*

A. Introduction.

The petition in this case presents this Court with an opportunity to assess the decision of the Tenth Circuit Court of Appeals in *Ute Indian Tribe v. Utah,* 114 F.3d 1513 (10th Cir. 1997), Pet. App. 1a-36a. The *Ute Indian Tribe* decision misconstrues *Hagen v. Utah,* 510 U.S. 399 (1994) to preserve historic reservation boundaries, contrary to the submissions in *Hagen* and contrary to the related precedent of this Court. As a result, the "reservation" area resurrected in *Ute Indian Tribe encompasses tens of thousands of acres of fee lands that are not owned or populated by members of the Ute Indian tribe. But see Yankton Sioux Tribe,* 66 U.S.L.W. at 4096 ("contradicts the common understanding of the time: that tribal ownership was a critical component of reservation status").

As a practical matter, the response of the State of Utah affirmatively establishes the need for this Court to exercise discretionary jurisdiction in this case. It does so by confirming in no uncertain terms the "jurisdictional chaos" that will result if the Tenth Circuit's decision is allowed to stand:

> The *Tribe* and the *Counties* have aptly described the present situation as one of "*jurisdictional chaos,*" characterized by *many* categories of land ownership

> and a wide variety of unanswered jurisdictional questions. For example, just to determine jurisdiction in an arrest for criminal activity, both a *survey* to determine the exact location of the crime *and* a *title search* to establish the *past* and *present* ownership of the land are often necessary.

Resp. of the State of Utah to Req. for Statement of Position at 3, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (No. 97-570) (emphasis added).[1]

The extent of the unprecedented and unworkable nature of this decision is also exemplified in the manner in which it has been used to frustrate the mandate of this Court in *Hagen*. To date, the United States District Court has continued to enjoin the Counties from implementing (except for felonies) the *Hagen* mandate, even with respect to the homestead and townsite lands resolved by the *Ute Indian Tribe* decision, as we have previously recounted. Pet. for Writ of Cert. at 1-2, 5-9; Reply Br. of Pet'rs at 1, 2; Pet'rs Reply to Resp. of the State of Utah at 9 n. 6; *Ute Indian Tribe* (No. 97-570).

This Supplemental Brief is submitted to support the argument that the recent decision of this Court in *Yankton Sioux Tribe* confirms that *Ute Indian Tribe* misconstrued *Hagen*.

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[1] As previously noted:

> The federally funded and tribally assisted tract by tract *title* opinions and corresponding *mapping* processes, involve "28" different land categories and hundreds of thousands of acres of land. No one can accurately predict when such a project will be complete. *See also* the related argument set forth in the brief of *amici* States, Br. for the States of California, *et al.* in Supp. of Pet'rs at 12-15. . . .

Pet'rs Reply to Resp. of the State of Utah at 4 n.2, *Ute Indian Tribe* (No. 97-570). *But see Yankton Sioux Tribe*, 66 U.S.L.W. at 4096-4097 ("we give it a 'sensible construction' that avoids this 'absurd conclusion.' See *United States v. Granderson*, 511 U.S. 39, 56 (1994) (internal quotation marks omitted)").

B. *Yankton Sioux Tribe* Undermines the Reservation Boundary Premise of *Ute Indian Tribe* in Two Respects.

From the beginning, Duchesne County and Uintah County, Utah, have respectfully requested that consideration of this petition be deferred until after this Court had an opportunity to view the issue in light of the briefing and oral argument in *Yankton Sioux Tribe*. Pet. for a Writ of Cert. at 30; Reply Br. of Pet'rs at 10; Pet'rs' Reply to Resp. of the State of Utah at 10; *Ute Indian Tribe* (No. 97-570). In addition, these Counties submitted an *amici curiae* brief in support of the State of South Dakota and the South Dakota county in that case. Br. of Duchesne County, Utah and Uintah County, Utah, *Amici Curiae*, in Supp. of Pet'r, State of South Dakota, *Yankton Sioux Tribe* (No. 96-1581).

In every respect but one, the decision of this Court in *Yankton Sioux Tribe* unequivocally reflects the understanding and analysis of this Court's precedent as set forth in the briefs of the State and Counties in *Yankton Sioux Tribe*. The one point that remains less than clear, however, has prompted this Supplemental Brief. That point is found on the last page of this Court's opinion. It concerns the "limited" nature of the *Yankton Sioux Tribe* holding and the statement that the "holding in *Hagen* was similarly limited":

> [C]aution us, however, to *limit* our holding to the narrow question presented: whether unallotted, ceded lands were severed from the reservation. We need not determine *whether Congress disestablished the reservation altogether* in order to resolve this case, and accordingly *decline* to do so. Our holding in *Hagen* was similarly *limited*. . . .

Yankton Sioux Tribe, 66 U.S.L.W. at 4100 (emphasis added).

As a preliminary matter, it should be pointed out that the Counties do not, of course, question the validity of

this Court's determination in Yankton Sioux Tribe to limit the scope of the decisions in this manner. In South Dakota, the question of "whether Congress disestablished the reservation altogether" is expected to be decided in short order, on remand or in some related case. *Id.* Moreover, the express admonition of the Court that *Yankton Sioux Tribe* (and *Hagen*) did "not determine" this "disestablished the reservation altogether" issue will allow the parties in South Dakota to analyze the issue in light of the precedent of this Court, including *Yankton Sioux Tribe*. *Id.* Certainly, no one will now be able to argue that *Yankton Sioux Tribe* actually decided that issue.

Unfortunately, that was not the case when the Tenth Circuit considered *Hagen* and decided *Ute Indian Tribe*, which is the subject of this petition. And the problem lies in the manner in which the Tenth Circuit will likely repeat its misconstruction of what *Hagen* decided and its view of the *Hagen* limitation in the context of the *Ute Indian Tribe* opinion, at least in the absence of some additional guidance from this Court.

Without this guidance, if this petition is granted and the issue is remanded for further consideration in light of *Yankton Sioux Tribe*, in the Tenth Circuit the argument will now be made that because *Yankton Sioux Tribe* confirms the "limited" holding of *Hagen*, *Ute Indian Tribe* correctly resolves this case. In *Ute Indian Tribe*, the Tenth Circuit held:

> We do not, however, recall *Ute Indian Tribe III* in its entirety. To the extent that *Ute Indian Tribe III* decided matters not addressed in *Hagen*, finality requires those decisions to remain undisturbed. Thus, we modify our earlier judgment only to the extent that it *directly conflicts* with the holding in *Hagen*. . . . [T]o the extent that lands within the Reservation were unallotted, open for settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership. Accordingly, we hold that our prior judgment in *Ute Indian Tribe III* should be, and is

> now, modified to the extent that lands within the original reservation boundaries were unallotted, opened to non-Indian settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership. . . . In this case, we must determine the extent to which *Hagen directly conflicts* with our earlier conclusion that all of the above categories of non-trust lands remain within Indian country [erroneous conclusion that public domain statute did not affect reservation status] . . . . [T]he diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation. . . . We therefore conclude that *Hagen* did not erase the boundaries of the Uintah Valley Reservation and that the current "limits of [the] reservation" thus embrace the three categories of non-trust lands at issue.

Ute Indian Tribe, 114 F.3d at 1527-1530, Pet. App. 27a-35a (emphasis added).

In *Yankton Sioux Tribe*, this Court did not cite *Ute Indian Tribe*. Nevertheless, at first glance, to the extent that *Yankton Sioux Tribe* substantiates that the holding in *Hagen* was "limited" to unallotted lands, the Tenth Circuit's understanding of *Hagen* and the direct conflict *appears* to be confirmed. *Yankton Sioux Tribe*, 66 U.S.L.W. at 4100. On closer analysis, however, that portion of the *Ute Indian Tribe* holding directed to *Hagen* and reservation boundaries is now demonstrably incorrect.

In fact, *Yankton Sioux Tribe* undermines the reservation boundaries premise of *Ute Indian Tribe* in two respects. First, on its face, *Hagen* made clear that the historical Uintah reservation boundary was extingiushed. The Court set forth the following quotation in the text of *Hagen* in support of its conclusion, including the bracketing and special emphasis:

> Contemporary historical evidence supports our conclusion . . . . Inspector McLaughlin explained the effect of these recent developments to the Indians

> living on the Reservation. . . . "'You say that [the Reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but Congress has provided legislation which will pull up the nails which hold down that line and *after next year there will be no outside boundary line to this reservation.*'" . . . Inspector McLaughlin's picturesque phrase reflects the contemporaneous understanding. . . .

Hagen, 510 U.S. at 416-417 (quoting and adding emphasis to Minutes of Councils Held by James McLaughlin, U.S. Indian Inspector, with the Uintah and White River Ute Indians and Uintah Agency, Utah, From May 18, to May 23, 1903).

Importantly, in *Yankton Sioux Tribe* this Court repeated the point with respect to the historic "outside boundary" of the Uintah reservation:

> Cole's vivid language and entreaty to "break down the barriers" are reminiscent of the "picturesque" statement that Congress would "pull up the nails" holding down the outside boundary of the Uintah Reservation, which we viewed as evidence of diminishment in *Hagen*, 510 U.S. at 417.

Yankton Sioux Tribe, 66 U.S.L.W. at 4098.

If the historic reservation boundary had not been extinguished, the unallotted public domain lands in *Hagen* would still be 18 U.S.C. 1151(a) Indian country. This Court's precedent in *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), cited with approval in both *Hagen* and *Yankton Sioux Tribe*, set forth this fundamental concept. This is the only way that this Court has ever recognized that lands can be "severed" from any reservation. *Yankton Sioux Tribe*, 66 U.S.L.W. at 4100. *See also United States v. Pelican*, 232 U.S. 442 (1914); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v.*

Arnett, 412 U.S. 481 (1973); *Rosebud Sioux Tribe*, 430 U.S. 584; *Solem v. Bartlett*, 465 U.S. 463 (1984); *Hagen v. Utah*, 510 U.S. 399 (1994); *Yankton Sioux Tribe*, 66 U.S.L.W. 4092. The analysis and holding in *Yankton Sioux Tribe* again confirms this understanding. *Yankton Sioux Tribe*, 66 U.S.L.W. at 4096.[2]

In contrast, *Ute Indian Tribe* expressly rejected this premise:

> In *Hagen*, the Supreme Court did not decide . . . erasing its *outer boundaries*. . . . *Hagen* did not erase the boundaries of the Uintah Valley Reservation.

Ute Indian Tribe, 114 F.3d at 1530, Pet. App. 34a-35a (emphasis added).

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[2] Even prior to the decision in *Yankton Sioux Tribe*, the Counties submitted this same argument:

> [T]he holding of the Tenth Circuit could not possibly be correct even if one were to assume *arguendo* that *Hagen* only decided the non-reservation status of the lands specifically restored to the public domain (and not the status of the lands that remained). Precedent (*DeCoteau* and *Rosebud*) establishes that non-reservation status of the restored lands in all instances is *necessarily* tied to the disestablishment of historic reservation boundaries and *Hagen* relied on that precedent. Even if *Hagen* was not intended to also resolve the status of the other lands that remained, it certainly cannot be maintained that *Hagen* intended *diminishment* in the *unprecedented* format adopted by the court of appeals. Nevertheless, this is what the court of appeals has erroneously decided that *Hagen held*. The State of Utah strongly disagreed with this view of *Hagen*.

Pet'rs Reply to Resp. of the State of Utah at 7 (No. 97-570). In addition, *see* the discussion in *Yankton Sioux Tribe* where this Court discusses the *Yankton Sioux Tribe*, *DeCoteau* and *Hagen* Acts and "diminishment," and then points out how the 1894 Act was "readily distinguishable from surplus lands Acts that the Court has interpreted as *maintaining* reservation boundaries." *Id.* at 4096 (emphasis added); ("Our touchstone to determine whether a given statute *diminished or retained* reservation boundaries. . . .") and ("The Tribe asserts that because that clause purported to conserve the provisions of the 1858 Treaty, the existing reservation boundaries were *maintained*.") *Id.* at 4096 (emphasis added).

Ute Indian Tribe never did recognize that extinguishment of historic boundaries and complete extinguishment of reservation status were separate issues. As a result, *Hagen* was misconstrued in *Ute Indian Tribe* and this argument is blurred throughout the substantive part of the decision. *Id.* at 1528-1531, Pet. App. 29a-36a.

Second, in the process of confirming the limitation in both *Yankton Sioux Tribe* and *Hagen,* this Court also clarified a related point in both decisions by explaining that the issue of "whether Congress disestablished the reservation altogether" was not decided in *Yankton Sioux Tribe* and that the holding in *Hagen* was "similarly limited." *Yankton Sioux Tribe,* 66 U.S.L.W. at 4100. As a result, any discussion of reduced reservation *boundaries* attributed squarely to *Hagen* presumes the continued existence of an 18 U.S.C. 1151(a) reservation in some form—the very issue that *Yankton Sioux Tribe* states was *not* decided in either *Yankton Sioux Tribe* or *Hagen.*

Ute Indian Tribe first makes this fundamental error in stating:

> Further, we agree [with the district court] that *Hagen's* only *effect* was to *reduce* . . . the *boundaries* of the Uintah Valley Reservation. . . .

Ute Indian Tribe, 114 F.3d at 1528, Pet. App. 29a (emphasis added).

In addition, *Ute Indian Tribe* compounds this same mistake by explicitly assuming the question not decided:

> The Court stated that the Uintah Valley Reservation had been "diminished"—*not* "disestablished," "eliminated," or "terminated." *Moreover,* the diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation.

Id. at 1530, Pet. App. 34a-35a (emphasis added).

In other words, *Hagen* did *not* hold that the boundaries of the historic Uintah Reservation were somehow reduced

to *exclude* only those lands actually restored to the public domain and, at the same time, somehow *modified* to *include* all other lands, as *Ute Indian Tribe* has decided. *Hagen* left the issue open and *Yankton Sioux Tribe* made this point perfectly clear. *Yankton Sioux Tribe,* 66 U.S.L.W. at 4100.

In the final analysis, *Ute Indian Tribe* did not adhere, as this Court did in *Yankton Sioux Tribe,* to the admonition of *DeCoteau*:

> Here, as in *DeCoteau*, we believe that Congress spoke clearly, and although "[s]ome might wish [it] had spoken differently . . . we cannot remake history." 420 U.S., at 449.

Id.

CONCLUSION

A strong argument can be made that *Hagen* intended the unresolved issue of "whether Congress disestablished the reservation altogether" to be limited to the "status" of 1.2 million acres of trust land. *Yankton Sioux Tribe,* 66 U.S.L.W. 4100. This was the basis upon which *Hagen* was submitted to this Court, as the Counties have repeatedly pointed out. A remand for further consideration of the issue in this context would resolve the issue consistent with the history of *Hagen.* It would also cure the unprecedented "jurisdictional chaos" this Court never intended to create in the first instance.

In oral argument in *Yankton Sioux Tribe*, on December 8, 1997, the United States unequivocally conceded that unless this Court accepted their position, the remaining reservation in the Yankton area, if any, would be similarly limited to trust lands. Tr. of Oral Argument at 49-52, *Yankton Sioux Tribe* (96-1581). The next month, on January 30, 1998, the United States ignored that concession and completely reversed its position. On that date, the United States submitted a "Jurisdictional Memorandum" in a South Dakota criminal case that urges the court to apply the rationale and result of *Ute Indian Tribe* in

the Yankton area (admitted "jurisdictional chaos"). Jurisdictional Memorandum, *United States v. Rainbow*, No. CR. 97-40086-01 (D.S.D. Jan. 30, 1998). Apart from other objectionable features, this entire process belittles this Court's venerable precedent in *DeCoteau* and *Rosebud*.

The petition for a writ of certiorari should be granted and this Court should fashion some type of appropriate relief. The need for special clarification is supported by the "jurisdictional chaos" in the area that all parties, including the Ute Indian tribe and the State of Utah, recognize and concede. It is further supported by the submission of the United States in the Tenth Circuit Court of Appeals that this case involves issues of "continuing public importance." Br. for the United States at 13, *Ute Indian Tribe* (No. 96-4073).

Alternatively, because the United States has still elected not to express its views to this Court regarding *Ute Indian Tribe's* construction of *Hagen*, we respectfully suggest that the United States be invited to do so at this time. The United States, at the very least, should explain how, in this case, it could tell this Court one thing and then tell the court below a different story.

Respectfully submitted,

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